

STATE OF MICHIGAN
COURT OF APPEALS

In re THERESA M. AFFELDT INTERVIVOS
TRUST.

ROBERT J. AFFELDT,

Petitioner-Appellant,

v

JAMES P. SMITH, JR., Trustee

Respondent-Appellee.

UNPUBLISHED
September 10, 2002

No. 228072
Macomb Probate Court
LC No. 87-099328-TI

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Petitioner appeals as of right from the probate court's order approving the final account filed by respondent trustee. We affirm.

I. Facts and procedure

In March 1986, Theresa M. Affeldt established the "Theresa M. Affeldt trust," under which Affeldt's nephew, respondent James P. Smith, Jr., was appointed trustee. The trust corpus was to be used for the support of Affeldt during her lifetime and divided and distributed to several beneficiaries upon Affeldt's death. In January 1997, Affeldt died and respondent distributed the remaining trust assets to the named beneficiaries. Petitioner Robert J. Affeldt, another of Theresa M. Affeldt's nephews and a remainder beneficiary under the trust, received \$13,882 in trust proceeds. In March 1997, respondent provided petitioner a final statement, purporting to document all transactions related to the trust between January 1, 1996 and February 28, 1997.

In December 1997, petitioner brought the present action for an accounting of respondent's transactions under the trust. Respondent moved for summary disposition, arguing that petitioner's suit was untimely. The probate court granted summary disposition for respondent with respect to pre-1996 events, but denied summary disposition with respect to respondent's activities under the trust after January 1996. Petitioner then brought his own motion for summary disposition, arguing that he was entitled to judgment as a matter of law on his allegations that respondent engaged in fraud after January 1996. The court denied that

motion. Thereafter, the court issued an opinion and order approving respondent's final account of the trust.

II. Analysis

On appeal, petitioner first argues that the probate court erred in granting respondent's motion for summary disposition concerning pre-1996 events. This Court reviews de novo a decision on a motion for summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), a court considers the affidavits, pleadings, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Smith, supra*. The court may grant the motion if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Petitioner's action for an accounting claimed that respondent engaged in fraud against the trust beneficiaries. The elements of fraud are: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false, or the defendant made it recklessly without any knowledge of its truth and as a positive assertion; (4) the representation was made with the intent that the plaintiff act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992), quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). In the present case, petitioner generally claims that respondent engaged in numerous instances of fraud against the trust beneficiaries as early as 1984.¹ According to petitioner, respondent engaged in a "policy of fraud" throughout his involvement with the trust.

Significantly, petitioner has not pleaded with specificity any claim of fraud. Fraud must be pleaded with particular facts. MCR 2.112(B)(1); *Nederlander v Nederlander*, 205 Mich App 123, 128; 517 NW2d 768 (1994). General allegations are not sufficient to state a claim of fraud and mere speculation is not sufficient to overcome a motion for summary disposition. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995). At no time has plaintiff pleaded a viable claim of fraud.² Therefore, respondent is entitled to judgment as a matter of law with respect to the fraud claims. *Id.* Furthermore, we reject petitioner's additional argument that

¹ According to petitioner, even before the formation of the trust, respondent conspired with other family members to change ownership of funds that ultimately related to the trust.

² To the extent that petitioner now asserts in his brief on appeal that respondent engaged in fraud during the proceedings below, we do not consider these assertions because they were not raised and addressed below and, therefore, were not preserved for our review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

the trial court erred in denying his motion for summary disposition on the basis of his fraud claim.³

Petitioner's claim that respondent failed to keep the trust beneficiaries informed by way of accountings under MCL 700.814 also fails. The evidence establishes that petitioner received several accountings during Theresa M. Affeldt's lifetime. Respondent attached to his motion for summary disposition letters from petitioner in which petitioner referred to the receipt of certain trust statements. A 1997 letter signed by petitioner refers to petitioner receiving year-end statements "[o]ver the years," and specifically mentions the 1995 accounting. A 1995 letter signed by petitioner refers to receipt of accounting reports for 1992 through 1994, which are described as "very cryptic in nature." Respondent also submitted a 1992 letter signed by petitioner requesting an accounting and a response signed by respondent stating, "As per your request, enclosed is a copy of latest trust statement."

Given that the evidence establishes petitioner actually received several annual accountings, petitioner knew or should have known of any fraud claim arising from the accountings that were actually received. Similarly, petitioner knew or should have known of any claim stemming from respondent's alleged failure to issue several accountings when he did not receive the accountings. However, as discussed, petitioner failed to plead fraud and did not otherwise assert a claim in connection to the accountings or failures to account. Under these circumstances, laches bars petitioner's claims regarding respondent's failure to provide adequate accountings. *Dep't of Public Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996); *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 583; 458 NW2d 659 (1990).⁴

Petitioner also challenges the probate court's opinion and order approving respondent's final account. Petitioner claims that the court failed to make adequate factual findings to support its conclusion regarding the final account. We review the probate court's findings of fact for clear error. *In re Ansell Family Trust*, 224 Mich App 745, 749; 569 NW2d 914 (1997). A trial court sitting without a jury must make specific findings of fact and state its conclusion of law separately. MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). Contrary to petitioner's argument, the court's opinion clearly reflects its findings and conclusions of law regarding the contested issues in this case. Moreover, petitioner

³ Because petitioner failed to plead an action for fraud in the first instance, respondent's failure to submit contradictory evidence of fraud in response to petitioner's motion for disposition is not dispositive.

⁴ We do not find this Court's general reluctance to apply laches in cases involving a relationship of trust and confidence prohibitive in this case. See *Schmude Oil Co*, *supra*. All of the policies supporting laches apply in this case. The record establishes that petitioner had concerns regarding respondent's submission of accountings many years before the death of the lifetime beneficiary, yet petitioner chose to wait until December 1997 to file a claim that challenged transactions over the prior decade. Under these circumstances, we conclude that the doctrine of laches is appropriately applied to this case.

has not introduced any evidence demonstrating a genuine issue of material fact with respect to the accuracy of respondent's final account.

Affirmed.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh